

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION**

**CASE NO. 3615**

Heard in Montreal, Wednesday, 9 May 2007

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Violation of the provisions of article 53 and Addenda 31A, 31B, 31C and 31D as a result of the Company's operating plan calling for the relocation of the conductor or assistant conductor in the cab of the locomotive while operating in GO service.

**JOINT STATEMENT OF ISSUE:**

On August 28, 2006, the Company issued a notice of material change to the TCRC to eliminate the second locomotive engineer on thirty-four (35) GO trains operated by CN in the greater Toronto area (GTA).

On November 28, 2006, the unions [TCRC & UTU] were advised that the Company's operating plan included the relocation of the conductor or assistant conductor into the cab of the locomotive where warranted.

On December 19, 2006, the Company advised the Union that the reduction of the second locomotive engineer's positions would be implemented on December 30, 2006. On December 20, 2006, the Union submitted a grievance citing that the Company's operating plan violated the provisions of article 53 and Addenda 31A, 31B, 31C and 31D of the collective agreement 1.1 concerning "filling a vacancy as Second Employee in the Cab".

The TCRC seeks a declaration that the collective agreement has been violated. The TCRC requests that the arbitrator order the Company to comply with the collective agreement and compensate all employees who suffered loss of earnings as a result of its actions.

The Company disagrees that the relocation of the conductor or assistant conductor in the cab of the locomotive is in violation of the provisions found in the 1.1 agreement concerning the filling of vacancies as second employee in the cab of the locomotive. The Company denied the Union's request.

**FOR THE UNION:**

**(SGD.) P. VICKERS**  
**GENERAL CHAIRMAN**

**FOR THE COMPANY:**

**(SGD.) B. HOGAN**  
**MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

B. Hogan	– Manager, Labour Relations, Toronto
D. VanCauwenbergh	– Sr. Manager, Labour Relations, Toronto
J. Kelly	– Sr. Manager, Commuter Operations
D. Gagné	– Manager, Labour Relations, Montreal

And on behalf of the Union:

J. C. Morrison	– Counsel, Ottawa
P. Vickers	– General Chairman, Sarnia
J. Lucifora	– Local Chairman, Toronto
J. Wilson	– Division President, Toronto

## AWARD OF THE ARBITRATOR

The history of events giving rise to this dispute is not contested. As related in an arbitration award between the Company, the Union and the Intervener United Transportation Union, dated February 7, 2007, (**AH 571**) the Company gave a notice of material change to both unions to eliminate one of two locomotive engineer positions on the majority of GO trains operated by the Company for GO Transit in the Greater Toronto Area (GTA). When a further notice indicated that the change would be implemented on December 30, 2007 the Unions moved for interim and permanent relief before the Arbitrator. As related in that award, part of the decision made by the Company involved stationing either the conductor or the assistant conductor on the Lakeshore GO train to ride in the cab of the locomotive in the eastward direction, and in the cab car control unit travelling westward. The conductor or assistant conductor so stationed was to perform the normal duties of the craft, and to call signals with the locomotive engineer in compliance with rule 34 of the CROR. Part of the submission made to the Arbitrator by the United Transportation Union in that case was to the effect that the assignment took conductors and assistant conductors beyond the scope of the work contemplated in their collective agreement, and involved them in performing locomotive engineer's work. The Arbitrator rejected that submission, reasoning as follows:

Can it be said that the employees who are the subject of the adjustment being made by the Company are being used as other than conductors or assistant conductors in a manner that violates the letter and spirit of the collective agreement? The Arbitrator has substantial difficulty seeing how that can be so. As outlined in the Company's brief, without substantial dispute by the Union, the duties and responsibilities of the conductor and assistant conductor under the new arrangement are generally described as follows:

- ensure the train is operating in accordance with its operating authority
- monitor and communicate on approach of R42 limits
- monitor result of hotbox detection inspections
- perform pre-departure inspection at start location and perform air brake tests
- operate doors and accessibility ramp
- patrol train when conditions permit
- make public address announcements
- observe passengers entraining and detraining as conditions permit
- attend the cab car and comply with Rule 34 as conditions permit
- respond to Passenger Assist alarms as directed by the conductor

The reference to rule 34 involves the calling of signals with the locomotive engineer, a function which is fully consistent with the duties of conductors and assistant conductors in freight service. It also does not appear disputed that in an emergency situation the conductor and assistant conductor will have continued responsibility for flagging, as may be needed.

On a review of the evidence, the Arbitrator is satisfied that the nature of the duties assigned to the conductor and assistant conductor in GO train service on the Lakeshore line manifestly continue to be the core duties of the craft. They are not the core duties of a locomotive engineer. While the Arbitrator appreciates that the change in positioning represents a major adjustment in the workday routine of the conductors and assistant conductors on the Lakeshore line, for the purposes of this award it is essential to recognize that the work in question remains work of a conductor or of an assistant conductor which can properly be assigned by the Company, as it has been. There is, very simply, nothing in the collective agreement which would prevent the Company from deploying the conductor and assistant conductor in GO train service as it has proposed to do under this new arrangement. Nothing in the Company's initiative violates any provision of the collective agreement, nor does it derogate from the decision of this Arbitrator in **AH 408**, a decision which confirmed the presence of both a conductor and an assistant conductor on GO trains in service on the Lakeshore line.

Prior jurisprudence had acknowledged the right of the Company to reduce the complement of locomotive engineers in GO train service. In **AH 552**, an award between these same parties dated April 21, 2004, the Arbitrator concluded that the notice provided to the Union with respect to the abolishment of one of two locomotive engineer positions in GO train service was properly given under the provisions of article 78.2 of the collective agreement.

The instant dispute arises by reason of the presence of the conductor or assistant conductor in the locomotive and in or next to the cab car control unit. The Union argues that the employee so stationed is effectively doing the work which was previously done by the second locomotive engineer. As part of its argument it invokes article 53 of the collective agreement which is entitled "Filling of Vacancies as Second Employee in the Cab". Articles 53.1 and 53.2 of the collective agreement provide as follows:

**53.1** The following provisions of articles 47, 48, 49 and 54, where applicable, will apply to the filling of a vacancy as a "second employee in the cab" of a diesel locomotive on a conventional passenger train when a fireman/helper is not available and when a vacancy as such exists:

**(a)** First Seniority District

Paragraphs 47.7, 47.9, 47.10, 47.11, 47.12, 47.15 and 47.16 of Article 47; and paragraphs 54.7, 54.8, 54.9 and 54.10 of Article 54.

**(b)** Second Seniority District

Paragraphs 48.7, 48.8, 48.9, 48.10, 48.11, 48.12, 48.13, 48.14, 48.17 and 48.18 of Article 48; and paragraphs 54.7, 54.8, 54.9 and 54.10 of Article 54.

**(c)** Third, Fourth and Sixth Seniority Districts

Paragraphs 49.8, 49.9, 49.10, 49.12, 49.13 and the Note thereto, 49.14, 49.15, 49.16 and 49.19 of Article 49; and paragraphs 54.11, 54.12, 54.13 and 54.14 of Article 54.

**53.2** Provided that the employee filling the position of "second engineer" is not restricted from working a position of in-charge locomotive engineer, the following procedure will apply in filling vacancies of locomotive engineer in passenger service:

When a regularly assigned in-charge locomotive engineer is absent for any reason, on a tour of duty basis, the regularly assigned "second engineer" will assume the position of in-charge locomotive engineer, except that:

**(a)** when the spare locomotive engineer called for the assignment is senior to the "second engineer", the spare locomotive engineer will assume the position of in-charge locomotive engineer;

**(b)** when two spare locomotive engineers are called for an assignment, the senior locomotive engineer will be the in-charge locomotive engineer.

The Arbitrator has substantial difficulty with both aspects of the Union's argument. Firstly, there can be no doubt but that the work performed by the conductor and assistant conductor while stationed in the cab of the locomotive or of the leading car cab unit is solely and entirely work associated with the craft of conductors and trainpersons. That much was clearly established in the award of February 7, 2007, and is confirmed by the evidence tendered by the Company in the instant hearing with respect to the duties of the employees so assigned. There is no suggestion on the material before the Arbitrator that the conductor or assistant conductor is in any way involved in the operation of the locomotive, or in any other aspect of locomotive engineers' duties. It cannot, therefore, be concluded that the persons so assigned must be viewed as falling within the bargaining unit of the Teamsters Canada Rail Conference.

What of the argument raised by the Union with respect to the impact of article 53 of the collective agreement? While the Arbitrator appreciates the depth of concern which motivates this grievance, and acknowledges the thoroughness of the presentation and arguments made by counsel for the Union, I cannot find in the wording and framework of article 53 language that compellingly supports the position advanced by the Union.

Firstly, it is essential to note that article 53 is not framed as a jurisdictional provision or as a provision intended to describe the work or duties of locomotive engineers. On the contrary, the purpose of the article is entirely directed to the means by which the position of a second employee in the cab is to be filled "... when a

vacancy as such exists:”. To that end, sub-paragraphs (a), (b) and (c) of article 53.1 designate the articles of the collective agreement on the various seniority districts which deal with the advertising and filling of positions including the “running of locomotive engineers” under article 54 of the collective agreement. What article 53.1 addresses is the placing in the cab of a person whose sole task is to assist the locomotive engineer, in a manner analogous to the fireman expressly referred to in the article. On the facts at hand, the Company has plainly opted against assigning such an employee to the cab of the locomotive in GO service.

It is a well established principle of Canadian arbitral jurisprudence that, absent clear collective agreement language to the contrary, it is the residual right of an employer to declare whether a vacancy exists in a given position. That authority is the reverse side of the coin which allows the Company to abolish a given position. In the case at hand, as noted above, the Company properly gave notice, as sustained by the arbitrator, of its decision to abolish the second locomotive engineer position in GO train service. To the extent that the position is abolished, there can be no vacancies in it. Nor does the collective agreement require the assignment of a second employee whose core duties involve helping the locomotive engineer.

Does the stationing of the conductor or assistant conductor in the same physical location as the former second engineer establish that there is in fact a vacancy or a job of work to be performed under the terms of the locomotive engineers’ collective agreement? I think not. At most what the evidence confirms is that the conductors and assistant conductors so assigned continue to perform the work which they have traditionally performed in GO train service, dealing with the entraining and detraining of passengers, ensuring that the train runs within its operating authority, monitoring hot box detectors, performing inspections and brake tests, patrolling the train as conditions permit and responding to passenger alarms, to name but a few. The accomplishment of those tasks from the same physical location as was occupied by the second engineer or a second employee helper to the locomotive engineer does not, of itself, lend any weight to the suggestion that a vacancy exists in the position of second engineer or second employee in the cab. In the result, no such vacancy can be said to exist. That alone would eliminate the application of article 53.1 of the collective agreement.

In the alternative, and setting aside the issue of whether GO train service constitutes a “conventional passenger train”, the overall scheme and intention of article 53 plainly reflects the parties’ understanding that the second employee in the cab described within article 53.1 of the collective agreement is virtually inseparable from the position of “second engineer”. That becomes apparent when the provisions of article 53.2 are read together with article 53.1. When reference is made to the provisions of sub-paragraphs (a), (b) and (c) of article 53.1, it is manifestly clear that the persons who are to be assigned to vacancies as second employees in the cab are persons holding seniority as locomotive engineers. Article 53.2 then goes on to deal with the issue of, as between the first and second engineer, who is to work the position of in-charge locomotive engineer. The Arbitrator is at a loss to see how these provisions could have been intended by the parties to in fact deal with the bidding or filling of vacancies as second employee in the locomotive by persons who are not in fact locomotive engineers, much less as a guarantee that there must be no less than two locomotive engineers in the cab of a locomotive in passenger service at any given time.

It is important to note that article 53 is not framed in terms of describing a minimum crew consist in passenger service. While it may be open to the parties to negotiate such a restrictive term, they only should be viewed as having done so by the presence in their agreement of clear and unequivocal language to that effect. No such language is presented in the case at hand. Nor can the Arbitrator give substantial weight to evidence to the effect that some thirty years ago communications from Transport Canada indicated that in passenger service there should be two locomotive engineers in a cab. Absent any contrary evidence, the Arbitrator must accept the response of the Company that its initiative to operate GO trains in the manner which it now does, using a single locomotive engineer, has been accepted by Transport Canada.

In the result, the Arbitrator is compelled to conclude that the collective agreement did allow the Company to abolish the second engineer’s position in GO train service on the Lakeshore Line, that it is under no obligation to declare a vacancy in the second-employee-in-the-cab position to assist the locomotive engineer and that the positioning of the conductor or the assistant conductor in the cab of the locomotive eastbound and in or near the control cab unit westbound does not violate the collective agreement.

For these reasons the grievance must be dismissed.

May 11, 2007

**(signed) MICHEL G. PICHER**  
**ARBITRATOR**